No. 8587

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES LUX et al,
Appellants,

V.

JAMES B. HAGGIN et al.,
Respondents.

Petition for Rehearing.

STANLY, STONEY & HAYES.

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To the Honorable, the Supreme Court of the State of California.

We are interested, professionally and politically, in the questions involved, and supposed to have been decided in this case.

We, therefore, beg that we may be permitted to join defendants counsel in asking for a rehearing and reargument of the cause.

We base this petition for a rehearing upon the following grounds:

FIRST.

This cause, in the principles involved and its effects upon the general prosperity of the State, and upon a large portion of those citizens of the State who are engaged in cultivating the soil, is the most important that this Court has ever been called to pass upon. The case is doubtless of transcendent importance to the parties to the litigation, but, notwithstanding the several millions of dollars which it is supposed are involved in the case, to these parties, their interests directly affected by this decision, are dwarfed into insignificance, when brought into comparison with the interests which the State itself and a large and important element of its citizens have in the principles involved and decided.

Owing to the peculiar climatic conditions existing in this State, water is, and will for all time continue to be, an element not of convenience or of luxury, but of indispensable necessity, in a sense far transcending, the necessity of the same element to the people from whom we have derived our common law. To them water was a necessity for domestic purposes only. To a large portion of the people of this State, this necessity has been so extended by climatic conditions, over which they have no control, that without water they cannot make their daily bread.

We have no data at hand, from which we can state, the proportion of tillable land in this State, which is and must forever remain useless, value-

less and unproductive, without other water than that which falls upon it from the clouds, but we are of opinion, from our knowledge of the State and of its agricultural capacities, that we will not be far out of the way in estimating the proportion of land in the State so situated at from two-thirds to three fourths of its entire tillable area.

A kind and beneficent Providence, having created these lands and infused or incorporated in them all the elements of fertility, except that of an immediate water supply, did not intend that they should be, and remain forever, unproductive and unresponsive to the wants of man's existence, while it at the same time created, and placed within man's disposal, a most abundant supply of the only indispensable and wanting element to make them abundantly productive of all those fruits of the earth upon which men are dependent for their subsistence.

God intended these lands for man's use, and for his use in the highest degree of productiveness, of which they are capable by the means placed by Him at the disposal of man's ingenuity and industry.

The prevailing opinion in this case effectually destroys the value of all of these lands, which have heretofore been rendered responsive to the wants of man by means of irrigation, where the water for irrigation purposes has been taken from a stream of any considerable length of flow, and dooms to perpetual unproductiveness all of such lands as are still unsupplied with irrigating water.

As we read this prevailing opinion, its author first ascertains the rule of the common law of England, applicable to riparian proprietorship, and announces that rule by a quotation from the opinion of Sir John Leach, in Wright *v.* Howard, in the following language, viz:

"Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors. No proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above." The author then goes on to say, that there is nothing in the books opposed to this announced doctrine except dicta, and then secondly decides that this common law rule has neither been "abrogated nor modified" in this State. These two determinations constitute the foundation which supports and sustains the prevailing opinion. With the first of these determinations we do not propose in this connection to deal. But we beg to make one or two observations upon a part of the second of these determinations, viz.: upon the proposition, that the common law rule has not been *modified* in this State. That this rule, when applicable, has been, to say the least, *modified* in this State, is evident from the opinions filed in this very case. This Court is composed of seven Justices, four out of this seven, *in this very case*, concur in the opinion, that the

common law rule has been so far *modified* that a super-riparian proprietor may use the waters of the stream *for purposes of irrigation.* This was a purpose, for which, as far as we are advised, it was never contended that a super-riparian proprietor could at common law use the waters of a stream. It is most certainly antagonistic to the rule as laid down by Sir John Leach in Wright *v.* Howard, and which is adopted in the prevailing opinion, *as the* correct definition and authoritative statement of the common law rule. The rule as thus laid down and adopted restricts the use of the waters of a stream by a super-riparian proprietor, to such uses as he may make thereof, consistent with a continuance of an *undiminished* flow of the stream to the lower proprietor. That this can never be done by a super-riparian proprietor, who uses the water of the stream for irrigation purposes, is evident to any one, who has the slightest knowledge of the absorbing nature of soils, and the capacity of plant life to *drink.* This absorption by the soil and this supply of *drink* to plant life, is the very object and necessary end of all irrigation. Where water is used for irrigation, it would be an exceedingly exceptional case, where *any* considerable portion of the water *could* be returned to the stream, to flow to the lower proprietor. The right of the super-riparian proprietor to use the waters of the stream for purposes of irrigation, is so utterly inconsistent with the right of the lower proprietor to an "*undiminished*" flow of the waters of the stream, that they can not co-exist.

If the right of irrigation by the super-riparian proprietor exists in this State, as is affirmed by *four* of the Justices of this Court—then the common law rule as adopted in the prevailing opinion does not exist here, *as stated*, but at the least in a "modified" form. The case as it now stands is an authority for the proposition, that the common law rule, as stated in the prevailing opinion, is the law of this State, *without any modification whatever*. We can not believe that either the Justice who wrote this opinion, or those who concurred therein, intended to go to this great length. It is manifest that the Justice who *specially* concurs in the prevailing opinion, and the three dissenting Justices do not assent to that proposition.

Before the decision of this case, the profession supposed, at least, that it had been settled in this State, that the right to use the waters of a stream for irrigation purposes, was the right of a super-riparian owner. The prevailing opinion sets this question afloat again; and if it remains as it now stands, the question must be again brought before the Court for determination.

A rehearing of the cause should be granted for this reason, if for no other. Let us have *something* in this question of water rights settled.

SECOND.

In view of the fact, that three out of seven of the Justices of this Court, have dissented from the views of the majority of the Court, we trust

that we may, with perfect respect for the author of the prevailing opinion, and those Justices who concurred therein, be permitted to say, that, in our opinion, he and they have greatly erred in recognizing, as the law of this State, the common law of England, upon the subject of riparian proprietorship, as laid down by Sir John Leach, in Wright *v.* Harwood, quoted in the prevailing opinion.

The question, as to whether an error has or has not been committed in this respect, is one of great magnitude, and one which can not be discussed in extenso in a petition for a rehearing.

The most that would be proper in this paper, would be the suggestion of those reasons, which occur to us, in support of the proposition that the Court has fallen into an error, and our present engagements are such that our convenience harmonizes with this propriety.

The prevailing opinion starts out with the attempt to ascertain and define "the character and extent of the right which the grantee of a parcel of land acquires in a natural stream of water running over it;" and while admitting the "perhaps impossibility" of defining the same with precision, comes to the conclusion *that by his grant* of the parcel of land the grantee becomes vested with all the rights of a riparian proprietor as defined by Sir John Leach in Wright *v.* Howard.

To our mind, the fundamental error of the Court consists in this assumption—that a riparian owner acquires *any rights* of a riparian character, *as a grant* from his *grantor*.

Riparian rights do not, and never did, lie in grant. The land lies in grant. Where "riparian rights," as defined by Sir John Leach, exist, they exist *as* an *incident* attached *to the land* by the *public policy* of the government where the land is situated. If the owner of land, so situated that those "riparian rights" are attached to it, conveys the land, with an *express reservation* to himself of all those things which are included in the expression of "riparian rights," he keeps nothing by his reservation, and all of those rights *attach to the land*, in the hands of his grantee, in spite of the reservation.

This is the inevitable and necessary outcome of the doctrine, which is now established law, that a riparian owner can not, by grant, annex these riparian rights to other lands, which, though adjacent to his own, are not themselves riparian lands of the same stream.

Ormerod *v.* Todmorden Mill Co., L. R., 11 Q. B., 155.

Wherever the "riparian rights" described by Sir John Leach exist, they are *attached* to the land, and can not be diverted *from* the land, in favor or for the benefit of any other land, than such as has attached to *it* the same incidents, by reason of *its* being so situated, as to be a participator in the *very* riparian rights of which the former is to be divested.

These familiar propositions show that these *incidents* of land, wherever riparian rights are recog-

nized, are not the subjects of grant, and that they do not attach to land by virtue of any grant thereof, either from a government or a natural person. How, then, and by what authority, do those *incidents*, which we know as "riparian rights," become attached to any land? I answer this question, by the quotation of the opening paragraph of Lord Ch. Jus. Hale's Treatise De Jure Maris, etc., viz: "Fresh rivers of what kind soever, do, of common right, belong to the owners of the soil adjacent." (Hargrave's Law Tracts, page 5.) This "common right" which attaches these incidents to land occupying certain situations, is nothing more than, and is entirely synonymous with "the public policy" of the government of the situs of the land. So that, to the vesting of a title to those *incidents*, known as riparian rights, two things are indispensable—1st, the ownership of land properly situated—and, 2nd, the existence of a "*public policy*" which attaches to that land those incidents. If *both* of these requisites do not co-exist, the *incidents* (riparian rights) can have no existence.

The title to the land is *one* thing—the title to these incidents (riparian rights) is *another* thing. In the absence of the "public policy" which attaches the *incidents*, the title to the land remains as if it were remote from the stream, or as if there was *no* stream at all. Without the existence of this public policy, to attach these *incidents* to the land, those *incidents* remain and continue the property of the governmental authority, which has the power of creating a "public policy."

Now, whether or not a government's conveyance of a given tract of land carries with it the *incidents* of riparian rights, as defined by Sir John Leach and adopted by this Court, depends upon the existence or non-existence of a "public policy" of that government, that those incidents should attach to land so situated as the particular parcel conveyed.

The prevailing opinion in this case treats this question as dependent *solely* upon the terms of the government's conveyance; and it is this mistaken assumption which, in our judgment, constitutes the fundamental error of that opinion.

That opinion does not even discuss the question, whether there be or be not such a "public policy" in this State.

It won't do to say, that this State has adopted the "common law," and that it is that *law* which attaches these incidents of riparian rights, to lands possessing certain conditions as to situation.

That is but begging the question, inasmuch as "common law" and "public policy," as to all public questions, are synonymous terms.

This State may have adopted the "common law," but its adoption constituted or could constitute the rule of decision of this Court *only* to the extent that it was, or so long as it remaind, consistent with the "public policy" of the State.

The common law was adopted in this State as the rule only in such cases as were not governed

by a settled public policy, and as soon thereafter as the State, in any authoritative manner, manifested the existence of a "public policy" repugnant or contrary to, any rule, doctrine or principle of the common law, that rule, doctrine or principle becomes as effectually repealed as if it were in express terms declared to be by the legislature.

There can be no doubt of this. At the time of the adoption of the common law in California, did this State have, or has this State since adopted, any "public policy" repugnant to the existence of "riparian rights," as defined by Sir John Leach, and adopted by the prevailing opinion in this case?

If the consideration of this question is approached, with that candor of inquiry, which indicates a search for the truth *only*, we are very confident that it is susceptible of but one answer, and that in the affirmative.

This "public policy" of the State was manifested most unmistakeably, at that early period of its history, when it first *recognized* the right of appropriation of water, *by any other than a riparian owner—or for any other purposes, than such as a riparian owner, could at common law have used the water.*

It is perfectly manifest that no statutory enactment *expressly* promulgating a "policy" is requisite for the creation or manifestation of that "public policy." Such a "public policy" may as well be created by *recognition*—by *acquiescence*, and by

common habit, as by *express* legislative promulgation. No authority can be necessary to sustain this proposition.

Accepting this, then, as an established point, we ask can any one name a period in the history of this commonwealth, when the right *to divert and use the waters of a stream for the purposes of mining, by persons who were not riparian proprietors, was not universally recognized, both by the government of the State and the people*?

Here is presented the case of the use of water by one *who could not have used the same at common law* and for a purpose *unknown to the common law of "riparian rights."*

So great was the extent of this, to say the least *modification* of the common law rules, that the right to take up *an entire stream* and *wholly* divert it from its original course to be used elsewhere than upon its banks, and to unite its waters with another or other streams for mining purposes crystalized into an *acknowledged and admitted right.*

It is no answer to say, that this was an *exceptional* and *temporary* departure from the common law. When this "public policy," that water might be so used, *by others than would have the right to use them and for purposes unknown to the common law* was adopted, it was supposed by *every one* that the *entire* value of the State consisted in its value for mining purposes. This, at that time, *universally* received opinion, indicates rather, that

this "public policy" was designed and intended to be of *universal* and *perpetual* application to the entire State. Who can point to the date, when, in the history of the state, the *right* to the use of the waters of a stream, for agricultural and irrigation purposes, was not admitted and universally recognized as an *established legal right*? The *right* was recognized by judicial decision and legislative enactment at a *very* early period in the State's history, but these judicial and legislative recognitions were not the promulgation of any *new* "public policy," but were *strictly recognitions only* of the existence of a "*public policy*," antedating the acts of *recognition*.

The truth is, that this "public policy" was in its *declaration* and *manifestation* co-eval with the existence of the State itself, in fact, it was an existing "public policy" of the people *before* they created the State.

In view of the fact that four of the seven Justices of this Court, in this very case, still adhere to the proposition, that the law of "riparian rights" had been modified, *to the extent that a super-riparian owner could use the water of the stream, to the extent of his reasonable requirements for the purposes of irrigation*, we think that notwithstanding the prevailing opinion *reads* otherwise, the Court will adhere to *that* as an *established* proposition.

The point we make in this connection is, that the *modification* of the law of riparian rights to the

extent of permitting a super-riparian proprietor to use the waters of a stream for irrigation purposes, *either works an entire abrogation of that law, as declared by the prevailing opinion herein, or impairs it to that extent that its system, in none of its parts, can be applied by the Courts, without the aid of express legislation.*

We, of course, reserve from the operation of this proposition any lands as to which there might have attached "riparian rights" *prior to the adoption by the State of that public policy, which was incompatible with such rights, or which worked the assumed modification to which reference is made.*

We have already pointed out, that the very essence of the law of riparian rights was the right of the lower riparian owner to demand and require an *undiminished* flow of the water of the stream, in order that he might have the *equal* use of the same, with the super-riparian owner. And we have also directed attention to the *physical* impossibility of a super-riparian owner using the water of the stream without *diminishing* its flow to the lower riparian owner, and without working that *inequality* in the use of the water of the stream, the prevention of which was the *sole* end of the law of "riparian rights."

We most confidently assert, that the law of "riparian rights," as defined, cannot co-exist with this right to use the waters of a stream for purposes of irrigation. The public policy, which permits the use of water for irrigation, is of necessity

adverse, antagonistic and repugnant to that public policy which is indispensable to the support of the English common law of riparian rights. It destroys utterly the *end* which the law of riparian rights was designed and intended to secure, *equality* of use between riparian owners. This *end* being destroyed, for what purposes is the rule to be continued? Who is to define the purposes for the continued application of the doctrine? The Court? Certainly not; for that would be, not the *application* of *law* to the facts in controversy, but the *making* of law.

That doctrine of the common law upon the subject of "riparian rights" constituted in itself a *system*. The "policy" of this State has *modified* that system, by permitting the use of flowing water for purposes unknown to the old system, and which inevitably introduces into the *old* system a state of disorganization, which can *only* be harmonized by the legislative power, In other words, the admitted *modification* of the old system of riparian rights, necessitates the creation of an *entirely new* system. Whose province is it to create this new system? Does the work require judicial or legislative functions? The Courts can not create it, without infringing upon the legislative power. What area of land may a super-riparian owner irrigate with the waters of the stream? Who is to answer this question, this Court or the Legislature? If the Court is to answer it, to what *law* can it appeal as the founda-

tion of its judgment? There is no statute, and there is certainly no common law upon the subject.

Suppose the super-riparian owner owns a fractional quarter-section of land bordering upon the stream, and then a strip of ten feet or less in width running from this fractional quarter-section, at right angles with the stream for five miles, to a ten-league Mexican grant which he owns—may he take *all* the waters of the stream, to irrigate his ten leagues of land, to the exclusion of other persons owning land *on* the stream? He would certainly have the right to use the water to irrigate his fractional quarter-section *on* the stream, but where in the *law* is there *any* limitation upon his right? Who is to define and establish these limitations? The Court could only do it in cases which might come before it, by the application of some rule of equitable jurisprudence, to the special and peculiar facts of each individual case. No one could by possibility know the extent of his rights, until his particular case had passed to final judgment. This will not do for *law*.

If the right to use the waters of a running stream for purposes of irrigation, is to exist, *in connection with*, the *end* which it was the purpose of the common law doctrine of "riparian rights" to secure, viz, *the equality of the use of the water of the stream by all riparian owners*, as it undoubtedly should, *this can only be accomplished by express legislation.*

Take a river of 100 miles length of flow, the lands on either side of which were, up to the time of the adoption of the public policy allowing flowing waters to be used for irrigation purposes, Government or public lands, these lands have been surveyed and sold in quarter sections to separate private owners from its mouth to its source; all these owners desire an equal use of the flowing water of the stream for irrigation purposes—is there *any law* which is to regulate the mode and manner in which they shall each have the equal benefit of the stream? Suppose, in such a case, some of these proprietors extend their possessions back from the river, are they to have the use of the water of the stream to irrigate any more land than the governmental subdivision which fronts on the river, and which governmental subdivision is to be adopted, the township, the section or the fractional section? and if so, how much and to what extent? Who is to decide these questions, and to lay down rules to govern the actions of persons so situated? Certainly not this Court. Do not these considerations demonstrate the correctness of our proposition, that the acknowledged and admitted *modification* of the common law doctrine of riparian rights, which permits the waters of a stream to be used for irrigation purposes, is so destructive of that system that its *principles* cannot be applied in this State until the Legislature acts in relation thereto? We submit that they do.

We think we can go much further, and successfully maintain the proposition that the common law doctrines and rules relating to riparian rights were never adopted and never prevailed in this State. But what we are now contending for is that no adoption which may have been made thereof, by the general terms of the Act of 1850, became or could become effective, to put these particular rules in operation, as laws of property, *without express legislative action defining to what lands in this State the rules should be applicable*, in other words, defining what lands in this State should be deemed "riparian" lands.

In England, this was not a question of difficulty. There *all* land from time immemorial had been in private proprietorship and with known and ascertained boundaries—and the *incidents* appertaining to them were as well known and as universally recognized, as were the rules of law which attached those incidents. In this State, we had no common law defining the lands, which should be riparian in character or separating them from those lands which should not possess those incidents, which were to be attached to "riparian" lands. In the absence of any common law, to make this definition and separation, it could only be done by Statute, and in the absence of any such legislation, the general adoption of the common law by the act of 1850, remained and still remains ineffectual to incorporate into our laws, the common law rules of "riparian rights."

But however this may be the existence of this "public policy" in this State, *from its infancy*, we submit, can not be successfully controverted. It seems manifest too that this "public policy" and the law of riparian rights as declared in the prevailing opinion, cannot *both* exist as the *law* of this State. Which is to prevail? Unquestionably the "public policy" and that, if for no other reason, because that "public policy" has been recognized and adopted by *Statute*, as the law of this State.

The *existence* of this "public policy" of the State was in *terms* and *expressly* recognized by the Legislature of this State, by the adoption of the Civil Code of this State in sections 1,410 to 1,422 inclusive.

Bear in mind, that in its (in this respect) *essential part*, viz; that authorizing the *appropriation* of water—this legislation, is not the creation or declaration of any *new* "public policy." Upon the contrary it is but a *recognition* of and statutory adoption of a "public policy" which existed long prior to this enactment. The enactment itself does not leave this question in doubt.

By section 1,420, it is enacted that: "Persons *who have heretofore claimed the right to water and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose*, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases."

There could be no clearer recognition by the legislative authority of the *prior* existence in this State of a *right* to appropriate and divert the waters of a stream for any "useful" purpose, than is afforded by this section. The enactment is, in this respect, but a *continuance* of the prior existing *law*. The kind or character of law which created the right is of no consequence. Either a legislative enactment or an established public policy could have done so. And the right, if founded upon either, was, and is, as effective as if created by the other.

We say, that if no statute can be found, under which these *rights* to *divert* water, which are so carefully preserved and protected by this section of the statute were created, the conclusion is inevitable that they were created by and owed their origin to that "public policy" of the State, which, as we have contended, existed from its very infancy.

Now, how does this "*right*" to divert the waters of a stream which *always* existed and was *always practiced* in this State, comport with the law of "riparian rights," as recognized and declared by the prevailing opinion in this case?

The very essence and marrow of the common law rule which supports these "riparian rights," is that *no proprietor can have the right to use the water to the prejudice of any other proprietor, and no proprietor can diminish the quantity of water which would otherwise descend to the proprietors*

below, and that no part of the water of a stream can be used by any other person than a riparian owner, without the consent of all the riparian owners.

Section 1,410 of the C. C. provides that: "The right to the use of running water flowing in a river or stream or down a canyon or ravine, *may be acquired by appropriation.*"

The very passage of this enactment is a legislative declaration, that the right to the use of "water flowing in a river or stream or down a canyon or ravine," is a right which exists *only* by virtue of the "public policy" of the State. It is only by virtue of the existence of this "public policy," that the subject matter was a matter of legitimate legislative control. If the right was attached to land, *otherwise* than by this "public policy," the legislature could never have freed *any* tract of land in the State from those "rights." The very enactment of this section, is an authoritative recognition of the existence of the bed-rock *principle* which we have asserted, and the overlooking of which by the Court, we have stated to be in our opinion, the fundamental error in the prevailing opinion in this case. Having asserted this *principle*, this enactment, by its recognition of the prior existing right of appropriation of water, and its provision allowing subsequent appropriations thereof, *utterly wiped out and destroyed every vestige of the doctrine of "riparian rights," as defined by Sir John Leach.*

This right of future appropriation, as well as the recognition of the prior existing right to appropriate, is not confined to owners *upon the banks of the streams*, the water of which is to be appropriated. There is also no limit of the "purposes" for which the appropriation shall be made, nor is it restricted to the use of the land bordering upon or through which the stream may run. By section 1,411, these "purposes" may be any that are "useful or beneficial."—whether the water is to be used on the banks of the stream or hundreds of miles distant therefrom; whether to water the cattle grazing on the land bordering the stream or those grazing on land a hundred miles therefrom; whether to irrigate the land through which the stream passes, or that fifty or more miles removed therefrom. There is no condition that no more water shall be appropriated than such as can be taken without loss or injury to a proprietor of land lower down the stream. The appropriator can, by section 1,415, designate the quantity of water which he will take, without regard to its effects upon owners of land through which the stream may, in its natural course, flow in its continued passage. By section 1,414, the rule is adopted for the settlement of all disputes as to the use of water, that he who is "*first in time is the first in right.*" Could any two systems—the one defined by Sir John Leach, and adopted by the prevailing opinion in this case; and the other (the existence of which is both recognized and confirmed by this statute)—be more diametrically opposed to each other?

Could they possibly be more "repugnant" the one to the other? Can the ingenuity of the human mind conceive of two systems which can be more "inconsistent" the one with the other? We submit not.

If the rights recognized by this statute and for the protection of which express provision is made are "repugnant" to—if they are "inconsistent" with, the doctrines and rules enunciated by Sir John Leach, which are to prevail in this State? Which is to constitute the rule of decision in this Court? We submit that before this Court can disregard the policy of this State so emphatically and unmistakably recognized and declared, and recognize in its stead the policy which the statute has repudiated, that it must meet the proposition —did the people of this State have a right to adopt a "public policy" upon this question for themselves and did the Legislature have the constitutional power to pass this enactment? For it is *only* by holding the negative of these propositions, that it can be held that the common law doctrine, adopted in the prevailing opinion, prevails in this State. We have nothing to do with the question of the wisdom of this legislative policy. It may have been wiser had the Legislature established in this State the policy of the common law. It is altogether probable that a better and wiser system than that which was adopted, might have been adopted to take the place of the discarded system. But these are questions for the Legislature and not for this Court.

Granting that those "*incidents*" to land particularly situated, which we denominate as "riparian rights," are attached to the land, not by grant, but by the "public policy" of the governmental authority of the situs of the land, a proposition which we think can be demonstratively shown, and granting that the legislative authority of this State has adopted for this State a "public policy" utterly inconsistent with the existence of "riparian rights" as defined by the common law of England, the question recurs: *When did the public policy, declared by the legislature of this State, attach itself to the lands of this State?*

In discussing this question we shall adopt *for the purposes of this petition* only, the proposition that up to a certain time, the common law doctrine of "riparian rights" did exist in this State by virtue of the general adoption of the common law by the Legislature of 1850. And we shall not deny, that during the period when this common law rule was supposed to be in force, the owners of land situated upon a running stream of water or through whose lands a stream might flow, may have acquired the common law rights of "riparian" proprietors, of which they can not be divested, except by due process of law.

The legislature in recognizing the change which the "public policy" of this State had made in the common law doctrine of riparian rights (by the enactment of sec's 1410 to 1422 of the C. C.), recognized the fact that "riparian rights" may have

already accrued to certain lands, and expressly provided for their protection.

By section 1,422, it is enacted that: "The *rights* of riparian proprietors are not *affected* by the provisions of this title." This section, so far from weakening the positions that we have assumed in this paper, is to our mind an unanswerable authority in favor of those positions. It demonstrates that it was the *object* and the *purpose* of the enactment of the title to do away with any "riparian rights" which might otherwise have been required *after* the enactment. This section in its very grammatical construction refers *only* to "*rights* of riparian proprietors" *which existed at the time the enactment was made.*

The "*rights*" which it was designed to protect, were *only* such as were in a position to be "*affected*," *then, immediately, by the enactment.* Construed in connection with the other sections of the "title," this is the *only* construction of which it is susceptible, without making the entire "title" nugatory, ridiculous and absurd in the extreme. The fact that the enactment excepts from its operation, "riparian rights" *already* vested, conclusively shows that its design, that no such rights should *vest after* its passage. *Expressio unius est exclusio alterius.*

The view adopted by the prevailing opinion in this case is: that the "public policy" of this State, as evidenced by this enactment of the code, is a sort of a hotch-pot affair, which takes effect as of the

time when the State conveys *its* title to an individual owner. In other words, if the State owns a quarter-section of land through which a stream of water flows, and conveys the same *before* any one has exercised his right under the statute, of appropriating the waters of that stream, the grantee of the State takes the land *with* the *incidents* of riparian proprietorship as understood by the common law of England; but if some citizen has exercised his right of appropriating the waters of that stream, either under the laws recognized to have existed by or as given by this enactment, *before* the State has conveyed or sold such a quarter-section, *then* the grantee of the State takes the land *wihout* any of the *incidents* of riparian proprietorship being attached thereto.

The Court could never have assumed this most remarkable and unexpected position if it had not totally ignored the *principle* that "riparian rights" are altogether and entirely owing to the existence of a "public policy," which permits of such rights being vested. Who ever heard of a "public policy" that was capable of being so shifted and changed by the operations of any one single citizen? Take a stream of water, which runs a distance of one hundred miles in its course, and upon the banks of which the State owns a large number of quarter sections of land, and upon which at the time of the adoption of the public policy, the prior existence of which is recognized by the enactment of the C. C., there were no "riparian proprietors." The day after this public policy

went into effect, and so long as the State retains its ownership of all the land, any citizen of the State might have appropriated one-quarter of all the waters of this stream; the State now sells its lowest quarter section on the stream, and immediately thereupon the State's grantee becomes vested with a right, which enables him to deny to every other citizen of the State the privilege of appropriating a single gallon of the water of that stream, or of so using those waters as to *diminish* the flow of the stream alongside of or through the quarter section so granted him by the State. Suppose, in such a stream, an individual had the day after this public policy went into effect, appropriated the half of the water of the stream, and on the same day the same individual had bought the State's lowest quarter section of land on the stream, under the theory adopted in the prevailing opinion, this one individual would have become the practical owner of *all* the waters of that stream, and could have condemned to utter and perpetual barrenness all the lands on both sides of the stream for its whole course of one hundred miles! Take this same suppositive stream, with the same supposed appropriation of its water, and the sale by the State of the lowest quarter section upon it, and suppose the Government of the U. S. to be the owner of every alternate section of land on either side of the stream from its mouth to its source, what law is to govern and control the water rights of the grantees of the United States of lands on that stream? What would be

the case if the United States had never authorized the appropriation of water *on its* land? There is but one answer to these queries, which is both consistent with the existence of any *State* policy upon the subject, and which can relieve the subject matter of embarrassments and absurdities beyond the capacity of man to otherwise overcome or avoid, and that answer consists of the single and simple proposition *that the Government of the United States holds its land within the State subject to the State's policy as to riparian matters and all other matters of public policy, exactly as any private proprietor does, and the Government's lands can have as* ITS *incidents depending upon the public policy no incidents* INDEPENDENT *of that public policy.*

This proposition is not entirely dependent upon general principles. It is supported and sustained by *express* Congressional action. The first section of the Act of September 9th, 1850, admitting California into the Union, declares that it is "admitted into the Union on an equal footing with the original States, in all respects whatever"—and by this express provision, the State is entitled to declare and maintain any "public policy" whatever, upon any subject whatever, that *any* of the thirteen original States could have declared and maintained. That this subject of "riparian rights" had been the subject matter of the "public policy" of *all* of the original States, we believe to be susceptible of demonstration.

Again. By the third section of the same Act of Congress, certain *enumerated* restrictions were placed upon the power of the State, in relation to the public lands of the United States within the State—*and this enumeration does not include or embrace any restriction upon the enforcement of this "public policy" of the State.* The enumeration is only that the State "shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and the right to dispose of, the same shall be impaired or questioned, and that they shall never levy any tax, or assessment of any description whatsoever, upon the public domain of the United States."

By no possible forced construction, can these provisions be made to embrace a negative upon the power of the State to adopt any public policy it might please, which might affect the *incidents* of *all* land in the State, whether the same be public or private property.

We respectfully submit that this water question has been unnecessarily embarrassed and muddled by reference to the Acts of Congress authorizing the appropriation of water upon the public lands of the United States. Those Acts were of value only so far, as they permitted entry *upon* the public lands of the United States for the purpose of making efficient and available the appropriation of water *allowed and permitted by the public policy of the State.*

From these considerations we derive the conclusion that "riparian rights," so called, have no dependence whatever upon the *time* when the Government of the U. S. conveys *its* title to any part of the public domain to a private proprietor. It may well be that the policy of the U. S., as to the public domain in this State, was of such a character, that its conveyances to private owners were burdened with licenses and easements, which the Government, by its policy, may have granted to others. We have no quarrel with this proposition. But it is altogether another thing to refer to the Acts of Congress as having any connection with the creation of that "public policy" which creates the *incidents* to the ownership of land, which we know as "riparian rights," except in so far as those acts are in recognition of the *State's* policy upon those subjects.

We most confidently expect, if a re-argument is granted in this case, that we shall be able to demonstrate, to the entire satisfaction of the Court, that *eo instanti* the public policy for which we contend, and which was subsequently recognized and confirmed by the sections of the Civil Code referred to, prevailed in the State, that policy put an end to the acquisition of riparian rights, as mere incidents to land bordering on streams, *whether such land was then the property of the U. S. or of this State.*

And if we can maintain this position, of which we are so confident, the judgment of the lower

Court in this case must necessarily be affirmed, for there is no pretence *that the plaintiffs in this case had acquired any rights to the land for which they claim in this case, the incidents of riparian ownership, prior to the adoption of that public policy by the State.*

THIRD.

This Court, in the prevailing opinion, holds that the trial Court erred in sustaining the defendants' objection to the testimony offered by the plaintiffs in *rebuttal*—("after the defendants had rested")—to show that before the defendants' appropriation of the waters in controversy, the plaintiffs had certificates of purchase from the State for the lands to which the plaintiffs claimed were attached "riparian rights." The opinion proceeds upon the theory that: "If the appropriation was made while the State was the owner of said lands, the defendants' rights, as to the water appropriated * * * would be superior to those of subsequent purchasers of said land," and that certificates of purchase issued by the State before defendants' appropriation of the water, would be evidence that the plaintiffs had acquired the land and an interest in the water *before* the defendants obtained any rights by their appropriation.

We respectfully submit that this Court has erred in this ruling:

It appears from the prevailing opinion that the plaintiffs *alleged* their ownership of the land in question, and that it was "situated along and bor-

dering on Buena Vesta Slough," "which is * * and from time immemorial has been a part of a natural stream or water-course," and that the defendants denied these allegations *and specially pleaded a prior appropriation by them of the waters* in controversy.

If the issues so framed, did not impose upon plaintiffs, the burden, *in presenting their case*, of proving an ownership of the land, as of a time having relation to the date of defendants' *pleaded* appropriation, it would be hard to imagine a case where a plaintiff could be required to establish the material facts of his case in his evidence in chief.

The statute, Sec. 2,042 of the C. of C. P., provides that: "*Ordinarily*, the party beginning the case, must *exhaust* his evidence *before* the other party begins."

We are here presented, so far as is discoverable from the prevailing opinion, with the *ordinary* case of a plaintiff, who was called upon to *exhaust* his case, before the defendant began his case. The plaintiffs' allegation of their ownership of the land *was as of a particular date*. The defendants *pleaded* an appropriation of the water *prior* to that alleged date. The plaintiffs enter upon the proof of their title *as alleged*, and were, as we are informed, permitted, in addition to doing that, to offer evidence tending to show that they were vested with some equities to the same land *prior* to the acquisition of the title by them as alleged and proven by them.

The plaintiffs then close.

The defendants begin their case—prove their appropriation of the water *as pleaded*, and at a time when, as alleged by the plaintiffs and admitted by the pleadings, *the land still belonged to the State.* The plaintiffs then offer to prove, *that they had acquired some equity to the same land*, prior to their obtaining the title thereto, other than and different from the one, which they gave evidence of in their case in chief. To this offer defendants object, and the Court as it was *bound to do* in the face of this Statute, and especially without some other showing than these bare facts, sustained the objection—and this, the prevailing opinion holds to have been error.

Subdivision 3 of section 607 of the Code of Civil Procedure provides that after the defendant has offered his evidence:

"The parties may then respectively offer REBUTTING testimony *only*, unless the Court FOR GOOD REASON, in furtherance of justice, permit them to offer evidence upon *their original case.*"

If the defendants presented to the Court below any "*good reason*" or any reason at all why they should be permitted to go again into the proof of their "original case," after the defendants had closed, the fact is *not* disclosed in the prevailing opinion. It is hard to conceive from the condition of the pleadings as stated in the prevailing opinion, that any good reason therefor could *possibly* have existed. The *very* issue made by the pleadings involved of necessity the *time* of the vesting of plaintiffs right to the land. The defendants'

plea of appropriation, afforded ample notice that this *time* was an *essential* ingredient of the issue. The plaintiffs could not have been *surprised*. It is entirely unlike the case, where a defendant under the plea of the general issue, might give in evidence matters, of which the plea gave no notice. The plea of appropriation, was a *special plea*, which of necessity disclosed the facts upon which it was based.

If the Court below had overruled defendants' objection to this offered testimony in the absence of any showing by the plaintiffs of "good reason" why the established rule should not be followed, it would have been error.

The requirement of the Statute that "good reason" should exist for a departure from the rule it lays down, shows that it is not the *arbitrary* will of the Judge, which is to be appealed to in such an application. The application is not to be decided by the Judge's personal predilections for or against either of the parties. The discretion which the Statute vests in him, can only be brought into exercise by some kind of showing of "good reason" therefor.

The "good reason," which the statute says shall exist, why a litigant may be allowed to go into his case in chief in rebuttal, *must be presented to and passed upon by the trial Court, and not by this Court.* So far as the prevailing opinion affords light upon the subject, no "good reason" or *any* reason therefor was presented to either tribunal. It is, at all events, due to such of the profession

as wish to preserve, and endeavor to maintain, the reverence and respect due to this tribunal, that if those "good reasons," required by law, exis'ed, the fact, at least, should be stated, and the opinion be not left in the position where it is liable to the reasonable construction of being in this respect, an exercise of arbitrary power. To the admission of this evidence the defendants objected, that "it was irrelevant, immaterial, imcompetent, *and not proper testimony in rebuttal.*" The prevailing opinion holds that it was admissible and *apparently* for the sole reason that it was thought to be *material*, and without the slightest reference or notice of that part of the objection which was based upon irrelevancy or that the professed testimony was not proposed testimony in *rebuttal*. In other words, this Court holds that, because this offered testimony might be material to the *ultimate adjustment of the rights of the parties*, it was admissible in this case, notwithstanding the fact *that it was not responsive to any issue raised by the pleadings, and was most palpably not evidence in rebuttal.*

The complaint expressly alleged that the lands described therein *belonged to the State of California up to the year* 1876 *and later, and that in that year, and at various times thereafter, the plaintiffs acquired the State's title thereto.* Defendants, in their answer, admitted that the lands *belonged* to the State down to 1876 and later, and took issue with only so much of said allegation as asserted that in the year 1876, and various times

thereafter, the plaintiffs acquired the State's title thereto. The evidence which was excluded was offered for the purpose of *contradicting the plaintiffs' own allegations*, and of proving that the land did *not belong* to the State at the times alleged in the complaint, and *that the plaintiffs owned the land long prior to the date at which they averred their seizen*. In other words, the offered and excluded evidence did not tend to support the allegations of the complaint, but its only effect *was to prove the existence of a new case*, not only different from that alleged in their complaint, but inconsistent with facts admitted to be true by the pleadings.

The rule which requires that "Evidence must correspond with the substance of the *material allegations*, and be relevant to the question in dispute," and that "Collateral questions must therefore be avoided," was designed to advance, promote and secure the administration of justice.

The case now before the Court happily illustrates the wisdom of the rule. The plaintiffs tender the defendants an issue as to their ownership of certain lands, with certain incidents attached thereto, *as of a certain date*. The issue is accepted. Plaintiffs introduce evidence in support of the issue which they tendered. Defendants meet this by counter testimony, upon the same subject, and close. The plaintiffs then offer to prove that they had *another* right to the land in question at a date *long prior* to that alleged in their complaint, and at a time when, by the admissions of

the pleadings, the land *belonged* to the State. *This is the first notice which the defendants have of such a pretension.* The trial has then been in progress for weeks; were not the defendants entitled to an opportunity to meet this *new* case which the plaintiffs offered to prove? Manifestly, they could have had no such opportunity, if this testimony had been admitted *at that stage of the trial.* Its admission was to not only have been the introduction to a *new state of facts*, but this new state of facts *necessarily* infused into the case new and most important questions of law. In both respects, the defendants, in simple justice, should have had the opportunity of making preparation to meet both the new state of facts and the new questions of law involved. Can this be doubted? If this be so, it seems to us to *demonstrate* the proposition, that the offered and excluded testimony was *clearly* irrelevant and immaterial, as well as *not* proper testimony in rebuttal. The very *surprise* which it worked to the defendants, shows that it was matter *that should have been pleaded by way of amendment to the complaint.* If this had been done, the rules of law would have given the defense *a right* to a continuance of the trial, that it might have made preparation to meet this new case.

We beg the attention of the Court to another suggestion, as to this excluded testimony:

The Court in the prevailing opinion, holds that *all* of these excluded certificates, are *relevant, material* and *admissible.* And, substantially, that

the issue by the State of any *one* of these certificates of purchase, vested in the person to whom it was issued the rights of a riparian owner.

It manifestly appears from a mere glance at the record, that none of these certificates, *with a single exception*, embrace any land *which borders upon the stream the existence of which the plaintiffs attempted to prove.* But aside from that—upon a new trial that state of facts *might* be made to appear. Now did the author of the prevailing opinion, and the Justices who concurred in it, *intend to decide that lands not bordering upon a stream or through which a stream did not run*, had attached to them riparian rights? We think that this could not have been intended, but as the prevailing opinion now reads, *it will be the law of the case, upon any future trial, that any one of those certificates was effective* in destroying the defendants rights of appropriation, *regardless of the situation of the land described in the certificate.* If this is not *transparently* so—it is certainly susceptible of being so construed. We submit that upon an important question of this kind, the Court should be extremely careful not to handicap a party with any matter as "the law of the case," which is not necessarily involved in the decision and intended to be decided.

Again, as to these certificates of purchase. Are not the questions which may be raised, as to the effectiveness of these *certificates* to intercept, overrule and overthrow, an expressed policy of

the State, worthy of the most serious consideration of the Court?

And are not these questions, such as the parties have a just right to expect that the Court should in its opinion discuss, consider and express an opinion upon?

They are certainly very important questions to the defendants. They are scarcely of less importance to the State and its citizens at large.

There are many members of the bar to whom it seems paradoxical to say: that a bare certificate of purchase, where only one-fifth of the purchase price of the land, or less, is paid as a consideration of its issue, and as to which there is no power, authority or law to compel the person receiving it, to complete his purchase, and which is subject to annual forfeiture for non-payment of interest, conveys any such interest in land, as will enable the holder to *affect*, *defeat*, *change* or *modify* the expressed policy of the State in any respect.

We respectfully submit that if it is to be decided that these certificates are possessed of this transcendent *power*, it should be only when after the fullest discussion and consideration, it has been apparent that no other solution of the question is possible.

Many of us are unable to conceive how the possession of such a certificate of purchase enables its holder *to day* to prevent another person from appropriating the water of the stream, when *to-morrow*, by the holder having abandoned or *forfeited* his right to purchase the land by non-payment of a

year's interest on the unpaid part of the purchase price, the right of such other person to appropriate the water *is restored*. To many of us it is an inexplicable mystery, by what course of logic or reason, the position is maintained, that a single citizen of the State can at his will and at his pleasure *suspend the operations of a general law of the State* and again at his will and pleasure, *put the law in full force and operation*.

It seems to us plain that if *any* statute of the State *could* be construed as intending to vest any such right in any one or more of the citizens of the State, such statute *in that respect* would be so manifestly *unconstitutional*, that *no one* could for a moment doubt its ineffectiveness.

Before these questions are finally decided, *as they are necessarily held in the prevailing opinion in this case*, we beg, we entreat the Court to hear not only the counsel engaged therein, but also all persons interested in these questions of such surpassing general interest.

We must take it for granted, in the light of all *law* heretofore announced, that if the legislature, in its act for the disposal of the swamp lands of the State, had inserted an *express* provision "that any person who may receive a certificate of purchase hereon, may at his will suspend the laws of this State allowing the water of any large stream to be appropriated which runs by or through the land described in such certificate;" that that provision would have been held to be a nullity.

By what process of reasoning a statute which contains no such illegal provision *is held to mean the same thing by inference*, and that this inferential meaning is constitutional, while it would have been unconstitutional if *expressed*, is to us inconceivable. Respect for *vested rights* cannot work such an anomaly. The system of law, which provides for the *vesting* of a right in an individual to a specific parcel of property, which should carry with it *as an incident a vested right* to suspend a *general law* of the Governmental authority, creating the system, would be something so much more than a *novelty*, that it would be difficult to find polite language with which to characterize it. Rather than adopt a conclusion of such an extraordinary character, would it not be more in harmony with all preconceived ideas of what *Law* is, to hold that the *general laws* of a State, by virtue of their very existence, prevented the *vesting* of any right under any particular statute, which would destroy the *general law* itself, or which would enable *any* citizen, by his own act, to suspend and to put in operation any such *general law*, at his will and pleasure! Before the law of the prevailing opinion in this case, upon this subject, becomes, by the adoption of this Court, *the Law* of this State, we would like to have an opportunity of presenting our views upon this subject more fully than we can do in this paper.

FOURTH.

The plaintiffs in their case in chief, as it appears by the record, introduced evidence tending to show that there *was a continued and uninterrupted flow* of water in Buena Vista Slough.

They went into this question with not only *great*, but with the *utmost particularity—foot by foot*, as it were, of the whole of that which was claimed to be a *stream*. And this it was *necessary* for them to have shown in their case in chief, otherwise, even according to the prevailing opinion in this case, they would have failed in a very essential respect to have made out their case.

The plaintiffs did not rest with the proof of the existence of a stream *above* their lands, and the *general* proof that its waters in their flow reached and ran over their lands. They entered into the question of its *continuous* flow with the *utmost minuteness*. (Transcript, folio ,)

Defendants proved, or offered evidence in their case, which tended to prove, that there was not a *continuous* flow of the so-called stream from a point above the land of plaintiffs *to* or *over* plaintiffs' land. A part of that proof was that there were *natural obstructions* in the so-called stream, which prevented its waters from reaching plaintiffs' land. Now it is manifest that if there were any such *natural obstructions*, there could have been no continuous flow of its waters, and that the plaintiffs in proving the *continuous* character of the flow of water, were in the very na-

ture of the case bound to prove that there were no *natural* obstructions in the so-called stream to prevent its waters from reaching their land. It is evident from the very *particularity* with which they went into this question, that plaintiffs' counsel appreciated this necessity of their case. After the defendants had closed, plaintiffs offered to prove that there were no *natural obstructions* in the so called stream, and the Court sustained the defendants' objection to this offered testimony.

The prevailing opinion hold that in this, the trial Court erred.

Now, whether the Court below erred in this respect depends entirely upon the proposition whether the plaintiffs were or were not bound to prove in their own case, *that the waters of the so-called stream flowed therein to, by or over their land.* Unless those waters did so flow, they would have made no more of a case than if their land had had its situs in China. The waters could not have so flowed were there any natural obstructions in the so-called stream, which would *physically* prevent its doing so; and it inevitably follows that the plaintiffs were bound to prove, as a part of their own case, that no such natural obstructions existed. Much of what we have said upon the last point discussed is entirely applicable to this point. The testimony offered and excluded was not testimony in *rebuttal*, for the reason that the proof of the *identical matter* offered to be proved was *indispensable* to save the plaintiffs from a non-suit, or a dismissal of their bill.

And before they were entitled to go again into this question, the law required them to show some "*good reason*" therefor. As we are informed, the record contains no statement that *any* reason, good, bad or indifferent was tendered, to bring into exercise the discretion vested by the statute in the Court.

Doubtless, if plaintiffs had said to the Court, that in the course of their *minute* and *particular* evidence as to every part of the so-called stream, with the purpose of showing the continuous character of the flow of its water, they had from accident, or mistake, or misapprehension, omitted to show the character of the so-called stream, at the point where the defendants had given evidence tending to show that these natural obstructions existed, the Court would have permitted them to produce the offered testimony.

But this is not the case—far from it. There is no pretense that plaintiffs had not given evidence in their case in chief as to the character of the stream, *at the very identical points* where the defendants' testimony tended to show that these natural obstructions existed. As presented to the Court, the question was, shall plaintiffs be permitted to introduce *cumulative evidence* under the guise of its being evidence in rebuttal?

If the trial Court had applied any other rule than that which it did, and had been equally indulgent to the defense, it is impossible to say when the trial could have had an end; certainly not as long as the one side could find witnesses

which would testify differently upon *any* proposition from the witnesses on the other side.

We submit that the ruling of the Court below was correct, and that the *error* in this respect is in the prevailing opinion in *this* Court.

FIFTH.

The prevailing opinion states, that the fact that the plaintiffs knew of the intention of the defendants to divert the water under and in pursuance of their appropriation thereof, and of the construction by defendants of works for that purpose, but made no objection to the operations of the defendants before the commencement of this action, is "irrelevant," and would not constitute an estoppel upon the plaintiffs.

If the plaintiffs had a *title* to the lands, as to which in this case, it is claimed that riparian rights had attached, *prior to* or at *the time* that defendants made their appropriation and constructed their works, we think the conclusion of the Court, that the plaintiffs waived no rights by silence *might* be correct. But, if at that time, the plaintiffs only had *certificates* of purchase from the State, the only legal effect of which was to give them an *option* to obtain the State's title, as we understand the case to be, the rule would probably be otherwise, and the plaintiffs would and ought to be estopped bytheir silence.

Notwithstanding their certificates of purchase, the plaintiffs were not *bound* to complete their purchase from the State. They could have abandoned

their *trade* by the failure to pay the next succeeding annual installment of interest.

If they had failed to make such a payment, their rights would have ceased to exist, and the defendant's rights as appropriators of the water would have been good against the State, or any person obtaining any subsequent certificate of purchase from the State, even within the prevailing opinion.

Possessing this *power* by their own act of making the defendant's appropriation good and valid, as against the world, it would seem to have been incumbent upon the plaintiffs, when they saw the defendants in the act of making very large expenditures, to render their appropriation available, to give the defendants notice that they intended to exercise the *option* to purchase, which they had obtained from the State. At all events, it is a question as to which it is unnecessary for the protection of the plaintiffs' rights, *that it should be made the law of the case*, and this *law of the case*, as made by the prevailing opinion, may work great and irreparable injury to the defendants.

In view of the very great importance of the questions involved in this case, not merely to the parties, but to the whole State, we beg that the Court will, by allowing a re-argument thereof, permit us, and all others in interest, to present such argument as we may be able, in support of the affirmance of the judgment of the Court below.

Respectfully,

STANLY, STONEY & HAYES.